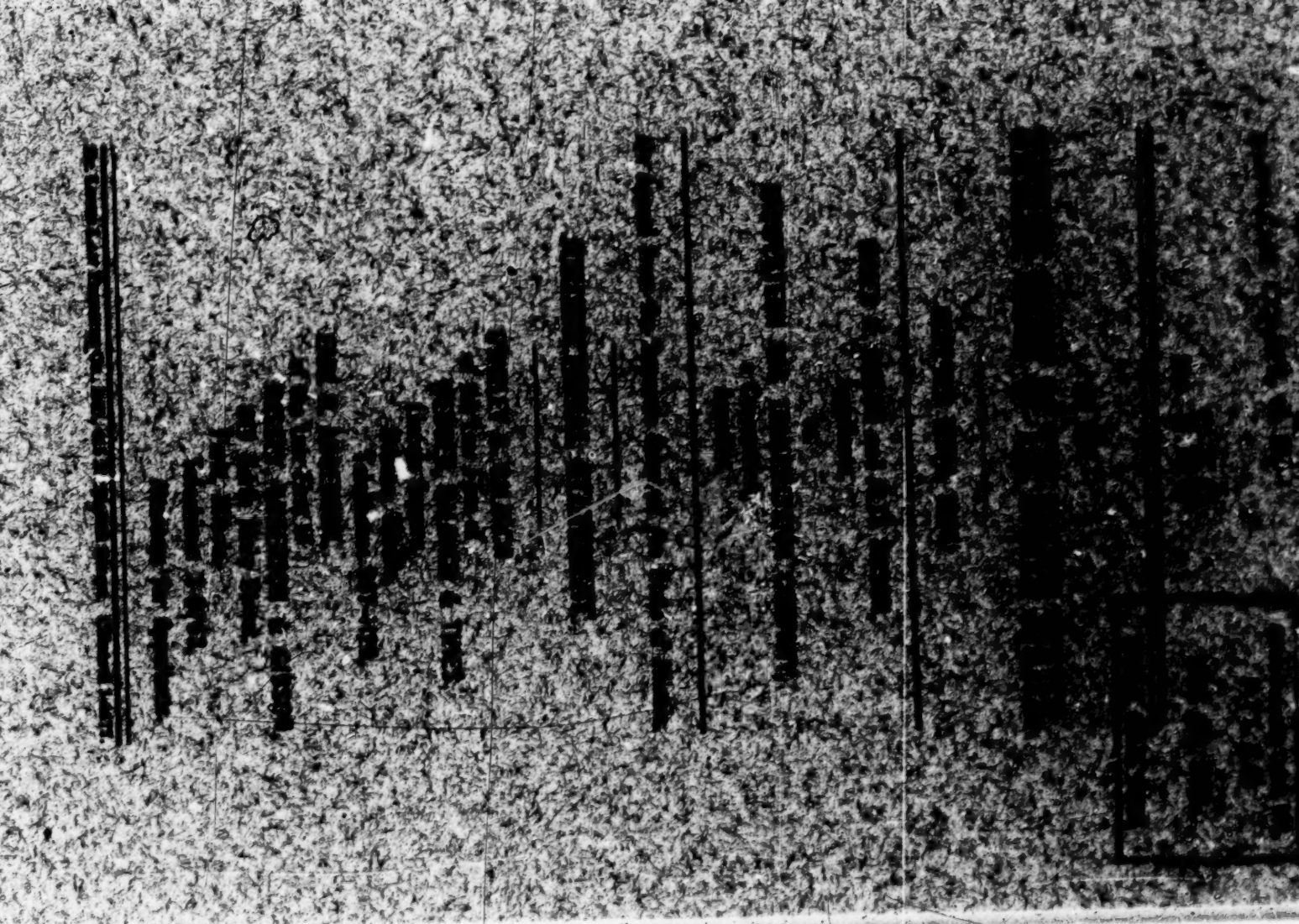

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1964.

JAMES H. MASON and ALTA MASON,
Appellants,

vs.

MIDWESTERN GAS TRANSMISSION COMPANY,
a Corporation,
Appellee.

On Appeal from the Supreme Court of the State of Illinois.

JURISDICTIONAL STATEMENT.

This is an appeal from a final judgment of the Supreme Court of Illinois entered on September 29, 1964 affirming an opinion of the trial court, the Circuit Court of Edgar County, Illinois. This statement is submitted to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINION BELOW.

The opinion of the Supreme Court of the State of Illinois is reported in 31 Ill. 2d 340, 201 N. E. 2d 379. A copy of the opinion is attached hereto as Appendix A.

JURISDICTION.

This is an appeal from a final order of the Supreme Court of the State of Illinois affirming the verdict in the trial court as to the amount of compensation to be awarded in an eminent domain proceeding brought by the Appellee pursuant to the Illinois Gas Storage Act, Ill. Rev. Stat. 1961, ch. 104, Sec. 104-112 (1961).

Judgment was entered by the Illinois Supreme Court on September 29, 1964. The notice of appeal was filed in the Illinois Supreme Court on November 4, 1964.

The jurisdiction of the Supreme Court to hear this appeal rests upon 28 U. S. C., Sec. 1257 (2).

The Appellants believe that this appeal is properly taken; but, if a proper mode of review is by petition for certiorari, then the Appellants rely on 28 U. S. C., Sec. 2103. Jurisdiction of this Court to pass on the unconstitutionality of a statute in its application is sustained by the case of **Near v. State of Minnesota ex rel. Olson**, 283 U. S. 697. The jurisdiction of this court based upon the question of the taking of property without due process of law in violation of the Fourteenth Amendment of the United States Constitution is upheld in **Chicago, B. & Q. R. R. Co. v. City of Chicago**, 166 U. S. 226.

STATUTES INVOLVED.

The Fourteenth Amendment to the Constitution of the United States provides in Section 1 that "nor shall any State deprive any person of life, liberty, or property, without due process of law" and the Fifth Amendment provides "nor shall private property be taken for public use, without just compensation."

The Illinois Gas Storage Act, Ill. Rev. Stat., ch. 104, Sec. 104-112 (1961) is set forth in Appendix B.

QUESTIONS PRESENTED.

1. Is the Illinois Gas Storage Act unconstitutional as interpreted by the Illinois Supreme Court to allow the taking by a public utility of underground gas storage rights without provision for the assessment or payment of compensation to the landowner?

2. Is it a denial of due process of law for a State court to refuse to admit any evidence as to the value of the underground gas storage rights for gas storage purposes because only the condemnor has the authority of the state to use the rights for gas storage?

3. Can the State of Illinois avoid the prohibition against taking property without compensation of the Fourteenth and Fifth Amendments of the Constitution of the United States by a two-step procedure whereby a legislative commission awards the underground gas storage rights of the landowner to a public utility without a hearing on valuation and in the judicial hearing denies all evidence of the value of those rights such as the need for underground gas storage, the presence of a competitive market, and the actual market value, on the ground that the rights have already been awarded to another?

STATEMENT OF THE CASE.

The Appellee on April 27, 1962 filed an application with the Illinois Commerce Commission pursuant to the Gas Storage Act (Appendix B) for an order approving an underground gas storage project in Edgar County, Illinois, and an order was entered approving the project on July 26, 1962 (Abstract p. 9, R. 3), but not providing for compensation as there is no provision in the Act for the assessment of compensation. The Appellee, citing the Gas Storage Act as authority, filed its petition on October 25, 1962 for condemnation of the gas storage rights in the

Appellants' land containing approximately 107 acres (Abstract p. 113, R. 3) which is a part of a gas storage project of the Appellee including approximately 3200 acres (Abstract p. 3, R. 3) located 1800 feet below the surface of the soil. A traverse was filed by the Appellants objecting to the condemnation proceeding under the Gas Storage Act because the Act is in violation of due process clause of the Fourteenth Amendment to the Constitution of the United States. A cross petition was filed in that proceeding alleging damages to land not taken and answer was made thereto.

The evidence offered by both sides at the trial of this cause showed that the geological strata being taken had a known value for the single purpose of gas storage. This is the purpose for which the Appellee sought to condemn the property. All evidence as to the value of the strata for this purpose was excluded by the trial court. The exclusion by the trial court was upheld by the Supreme Court which based its decision upon the previously decided case of **Peoples Gas Light and Coke Co. v. Buckles,** 24 Ill. 2d 520, holding that such evidence should be excluded for two reasons. The first was that the Illinois Commerce Commission had granted gas storage rights in the strata to the Appellee and, therefore, those rights could be of value to no one else. The second reason was that the desired strata under the Appellants' tract constituted only a portion of the entire storage dome, all of which was required for practical utilization as a storage area, and for this reason had no value to the defendant landowner for gas storage purposes.

With all evidence as to the value for the only known purpose stricken by the trial court, the testimony going to the jury was necessarily that the strata had no value which could be considered by the jury and the resulting verdict under the emasculated testimony was "no dollars" to the landowner.

How the Federal Question Is Presented.

The first pleading filed by the Appellants in the trial court was a motion to dismiss or traverse objecting to the proceeding under the Gas Storage Act in these words (Abstract pp. 50-51, R. 3):

> "4. The Gas Storage Act, being Chapter 104, Sections 104-112 inclusive, Illinois Revised Statutes, 1961, as interpreted by the Supreme Court of Illinois as preventing the landowners from utilizing the value of the strata taken for gas storage purposes in arriving at the just compensation to which the landowner is entitled, is in violation of Article V of the Amendments of the Constitution of the United States, which article provides in part:
>
> > 'No person shall . . . be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation.'
>
> and as this statute is interpreted by the State of Illinois it is in violation of Article XIV of said Amendments and particularly Section 1 thereof, providing that:
>
> > 'nor shall any State deprive any person of life, liberty or property, without due process of law, . . .'
>
> and in violation of Article VII of said Amendments, as that article is made applicable to the States under the due process clause of Article XIV."

which motion was denied and in the post-trial motion of the Appellants they again raised the Federal due process question as follows (Abstract p. 139, R. 3):

> "2. The Gas Storage Act, Ill. Rev. Stat. 1961, Ch. 104, Secs. 104-112, violates Sections 2 and 13 of Article II of the Constitution of the State of Illinois and

Articles V, VI, and XIV of the Amendments to the Constitution of the United States for the reason that said act by the Illinois Commerce Commission is interpreted by the Supreme Court of Illinois as allowing the petitioner in the proceeding wherein the order is granted authorizing the project to take from the landowners the right to store gas under the landowners' land without awarding any compensation to the landowners under an Act which grants no right of jury trial to the landowners and makes no provision for the awarding of compensation, just or otherwise."

and later in the same document (Abstract p. 143, R. 3):

"10. The Court's errors in refusing to allow any testimony or evidence which took into consideration the value of the Defendants' land for underground gas storage purposes were in violation of:

"c. That portion of Article XIV of the Amendments to the Constitution of the United States, which reads:

'Section 1. . . . . nor shall any State deprive any person of life, liberty or property without due process of law;'

"d. Articles V and VI of the Amendments to the Constitution of the United States as those Articles are made applicable to the States under the due process clause of the XIVth Amendment, which articles provide for the payment of just compensation and the right to a trial by jury.

"11. The verdict of the jury of 'zero' as just compensation for the underground gas storage rights is error and is in violation of:

"c. The due process clause of the United States Constitution (Section 1 of Article XIV of Amendments);

> "d. The United States Constitution, Article V of the Amendments, as that article is made applicable to the States under the due process clause of the XIVth Amendment."

which motion was also denied (Abstract p. 146, R. 3):

Under Illinois practice, the only pleading of the Appellants in the Supreme Court, other than the abstract of record, is denominated "Appellants' Brief" and in that document the Appellants raised the constitutional question at pages 28-29 (R. 5) with this language:

> "The Court excluded as immaterial all evidence of value which was related to the use of the underground strata for the purpose of underground storage of natural gas.
>
> "This interpretation of the Gas Storage Act renders it unconstitutional under both the State and Federal Constitutions because it means that the right to store gas in the sub-surface strata under the defendants' land was taken from them when the order was entered by the commission and there is no provision in the Gas Storage Act for the awarding of compensation and there is no provision in the act for a jury trial contrary to the provisions of the Illinois and United States Constitutions:
> (Citations to applicable portions to the Constitution of Illinois.)
>
> "Amendment XIV to the Constitution of the United States provides in Section 1 in part:
>
> > 'nor shall any state deprive any person of life, liberty, or property, without due process of law;'"

The Illinois Supreme Court makes reference to the constitutionality of the statute argument in its opinion:

"Defendants complain that the commission's order granted a monopoly to plaintiff and thereby destroyed a potential market for the underground storage. They say this, coupled with the holding of **Peoples Gas Light and Coke Co. v. Buckles**, 24 Ill. 2d 520, holding that unique value and adaptability of the strata for gas storage cannot be considered, invalidates the Gas Storage Act as a violation of due process and the taking of property without compensation under section 13 of article II of our constitution. We understand their theory to be that failure of the gas storage act to provide for just compensation and its failure to provide a jury trial in connection with the Commission's proceedings renders the act unconstitutional" (Appendix A, p. 22).

THE QUESTIONS ARE SUBSTANTIAL

This is a case of first impression in this court in an important and expanding field. The most economical method to store gas is underground whether in its natural state or injected as the Appellee seeks to do here. There has, consequently, been an explosive development in underground gas storage. The importance of this development should not overshadow the rights of the landowner in his property and his constitutional right to compensation when deprived of a property interest. The Illinois decision is clearly contrary to principles announced by this court in decisions involving identical principles. It is important that this court lay down the law which will control courts, litigants, and lawyers in resolving this and future cases concerning the measure of damages for the taking of such underground storage rights.

1. The Appellants have been deprived of a vested legal right by the Gas Storage Act of Illinois as the State has used its provisions to take the right to store gas under

the Appellants' land and award it to the Appellee without compensation and without, for all practical purposes, trial by jury. The court excluded as immaterial all evidence of the value of the strata which was related to its use for the underground storage of natural gas.

This interpretation of the Gas Storage Act renders it unconstitutional under the Federal Constitution. It means that the right to store gas in the subsurface strata under the Appellants' land was taken from them when the order was entered by the legislative commission pursuant to which the condemnation proceeding was brought. There is no provision in the Gas Storage Act for the awarding of compensation and there is no provision in that Act for a jury trial. This is contrary to the Fourteenth Amendment of the Constitution of the United States which provides in Section 1 in part: "nor shall any state deprive any person of life, liberty, or property, without due process of law;" and contrary to the Fifth Amendment which provides: "nor shall private property be taken for public use without just compensation." The case of **Chicago, B. & Q. R. R. Co. v. City of Chicago**, *166* U. S. 226, states at page 233:

> "that the prohibitions of the amendment (the Fourteenth) refer to all the instrumentalities of the State, to its legislative, executive and judicial authorities, and, therefore, whoever by public position under a state government deprives another of any right protected by that amendment against deprivation by the State, 'violates the constitutional inhibition; and as he acts in the name and for the State and is clothed with the State's power, his act is that of the State. . . .' These principles were enforced in the recent case of **Scott v. McNeal**, 154 U. S. 34, in which it was held that the prohibitions of the Fourteenth Amendment extended 'to all acts of the State whether through its legislative, its executive or its judicial authorities';

and, consequently, it was held that a judgment of the highest court of a State, by which a purchaser at an administration sale, under an order of a probate court, of land belonging to a living person who had not been notified of the proceedings, deprived him of his property without due process of law contrary to the Fourteenth Amendment."

The case emphasizes that "due process" requires attention to substance, and not just form, in these words at page 234:

> "Its judicial authorities may keep within the letter of the statute prescribing forms of procedure in the courts and give the parties interested the fullest opportunity to be heard, and yet it might be that its final action would be inconsistent with that amendment. In determining what is due process of law regard must be had to substance, not to form."

When the Illinois court says that the legislature, by issuing a certificate for storage, has denied the right of the landowner to prove what others would pay in a free and competitive market for such sub-surface rights and the right to introduce evidence of the value of his land for underground gas storage purposes, then it would appear that the legislative act would come precisely within the prohibition of the case of **Pennsylvania Coal Co. v. Mahon**, 260 U. S. 393, 414, 415:

> "To make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it."
>
> "The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."

The rule for the construction of a state statute by the United States Supreme Court is found in **Mo. Pac. Rwy. v. Nebraska**, 164 U. S. 403, 414:

"The construction so given to the statute by the highest court of the State must be accepted by this court in judging whether the statute conforms to the Constitution of the United States."

The legislative commission granted the right to the Appellee to seek authority to store gas under the Appellants' land. The trial court, in valuing the easement rights sought to store the gas, denied the Appellants the right to present evidence on the value of the land for underground gas storage purposes because another had already secured the authority of the State to so use the land. The construction of the Gas Storage Act by the Illinois court to permit the taking of a portion of the Appellants' property by legislative fiat without the payment of compensation would thus seem to be in violation of the Fourteenth Amendment to the United States Constitution.

That a substantial question is involved is found in the fact that underground gas storage is now being conducted in twenty-three states, from California to New York, and from Texas to Montana, with 278 reservoirs in operation. All of the more populous states are included. The reservoirs increased by twenty in 1963 and twenty-three additional storage pools are under construction. **1964 Report of Committee on Underground Gas Storage,** American Gas Association. Although there are many landowners in the same position as the Appellants, the economics of litigation are such that it is unlikely that they will be in a position to state their views to this court. Statutes similar to the Illinois Gas Storage Act have been passed in many states and in various other states underground gas storage is being sought under the condemnation provisions relating to public utility corporations, and the question of the right of the landowner to compensation for the thing taken is of nationwide concern.

The matter of the valuation of gas storage rights in an eminent domain proceeding has been questioned by the

highest courts in at least three states, Illinois, West Virginia, and Kentucky, and the decisions in West Virginia and Kentucky are at variance with those in Illinois. In **United Fuel Gas Co. v. Allen, et al.** (1953), 137 W. Va. 897, 75 S. E. 2d 88, the court held that the landowner, who has the burden of proof in West Virginia, failed to sustain that burden when he failed to introduce evidence as to the market value of the strata taken. Under Illinois law the burden is on the Plaintiff in an eminent domain proceeding to value the thing taken. The Illinois court not only did not require the Plaintiff to value the strata taken, it also refused to permit the Defendants to introduce evidence. In the Illinois case the testimony was that the strata had only one use, and that was for gas storage, and the court stated that it would permit no evidence on that use because the legislature has given that use to the Appellee.

In **Milby v. Louisville Gas and Electric Co.** (Ky., 1963), 375 S. W. 2d 237, the court recognized that the valuation of underground gas storage space was a difficult problem but said that since there was a demand by competing public utilities and since other land had been leased for this purpose, the rental prices paid in negotiated transactions should be entitled to consideration. We offered this specific type of evidence, and it was refused by the Illinois Court. The Kentucky court rejected the argument (made by the Appellee in this proceeding) that since no one had leased gas storage ground except public service corporations having the power of eminent domain, and since the storage space had no use except for a public service corporation, that the storage space under any single tract simply had no value.

2. The Illinois court by sanctioning a judicial process which requires a jury to find that underground gas storage rights, which are the subject of barter and trade in most of the states in the union, are of no value has so

far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision. Sup. Ct. R. 19, 1 (b). The evidence offered by the Appellants, which evidence was excluded but is preserved by offers of proof (Abstract pp. 129-135, R. 3), showed a market price for comparable underground gas storage rights and showed that a number of companies were interested in the rights in this particular field. In Illinois the only opportunity of the landowner for compensation is in the eminent domain proceedings and under both Illinois law and Federal law he is entitled to "just compensation" and a jury trial. We must not let the overzealous protection of the public interest infringe on the Appellants' constitutional rights because as Justice Holmes said in **Pennsylvania Coal Co. v. Mahon**, 260 U. S. 393, 414:

> "The protection of private property in the Fifth Amendment presupposes that it is wanted for the public use but provides that it shall not be taken for such use without compensation. A similar assumption is made in the decisions upon the Fourteenth Amendment. . . . We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."

It is just as logical to allow the condemnor who is seeking to acquire a dome containing oil to value the right to extract that oil only on the basis of the damage to the land not taken, as it is to allow the gas storage rights which are taken in the instant case, to be valued only on the basis of the damage to the land not taken.

It is a travesty to confiscate, in the name of justice and the public interest, the property rights of the individual. This court said in **Chicago, B. & Q. R. R. Co. v. City of Chicago**, 166 U. S. 226, 236:

> " 'Next in degree to the right of personal liberty,' Mr. Brown in his work on Constitutional Law says, 'is that of enjoying private property without undue influence or molestation' (p. 228). The requirement that the property shall not be taken for public use without just compensation is but an affirmance of a great doctrine established by the common law for the protection of private property. It is founded in natural equity, and is laid down by jurists as a principle of universal law. Indeed, in a free government almost all other rights would become worthless if the government possessed an uncontrollable power over the private fortune of every citizen.' "

The discovery of this dome was as significant to the economy of this area as the discoveries of oil which created payments in excess of $100,000 from wells located on this farm (Abstract p. 125, R. 3). The same type of dome that produced oil at the minus 900 foot level produces a giant storage area at the minus 2000 foot level (Abstract p. 112, R. 3). The value of the Mason land exclusive of this valuable storage dome is only a fraction of the value including this valuable geological structure. If the landowners had been permitted in their appraisal testimony to present evidence to the jury of the value of this great natural resource, the jury would have realized its economic worth and would have returned (or at least would have had the opportunity to return) a verdict greater than "zero" as just compensation for its taking. The economics involved are complex, the legal problems are not easy, but simple justice to the owner of any such natural resource would allow him its fair cash market value.

It is manifestly unjust to permit a public authority to depreciate property values by denying their use to any other for the only available purpose and then take advantage of the consequential depression in the price it must pay for the property. **U. S. v. Virginia Electric Co.**, 365 U. S. 624, 636. The Illinois court relied on **Peoples**

Gas Light and Coke Co. v. Buckles, 24 Ill. 2d 520, which, on the question of remoteness, cited the Virginia Electric case as authority for refusing to allow the introduction of evidence as to the value of the strata for underground gas storage purposes. This is a complete misinterpretation of this Supreme Court decision which in fact holds at page 635 that the impossibility of use by the condemnee of the property for the condemnation purpose by reason of the appropriation of that right by the condemnor shall be ignored in awarding compensation. It would appear that the Illinois court does not distinguish between the right of the United States to appropriate without compensation in connection with the retained constitutional power to control and regulate navigable waters and the general sovereign right of eminent domain.

Our case is even more extreme since, rather than depressing the price of the underground gas storage strata, its economic value is completely destroyed by what amounts to a legislative appropriation—a gift of privately owned land, or rights in land—to a utility company.

As Chief Justice Marshall said in **Marbury v. Madison** (1 Cranch. 137):

> "The Government of the United States is a government of laws and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right."

3. The Illinois decision is at variance with a number of the decisions of this court, and, since the Illinois court incorporates the reasoning in **Peoples Gas Light and Coke Co. v. Buckles,** 24 Ill. 2d 520, by paragraph six of its opinion, it is incumbent on the appellants to answer the arguments of both opinions.

a. The major argument of the Illinois court was the fact that to use the property for the underground storage

of gas required a permit which the Appellants did not have. This has already been discussed herein.

b. The Illinois court also argued that since the land of the Appellants is useable for underground gas storage only in connection with other lands, and since the Appellants do not themselves have the right of condemnation, it is not proper to consider a use which involves concurrence by a number of other landowners. Many cases in the Supreme Court of the United States recognize that the need for combination does not prevent the introduction of evidence, as a matter of law, where such combination is reasonably possible and typical of those cases is **McCandless v. United States**, 298 U. S. 342, 345:.

> "The rule is well settled that, in condemnation cases, the most profitable use to which the land can probably be put in the reasonably near future may be shown and considered as bearing upon the market value; and the fact that such use can be made only in connection with other lands does not necessarily exclude it from consideration if the possibility of such connection is reasonably sufficient to affect market value."

In 18 Am. Jr. 883 the rule is expressed in a footnote:

> "Special adaptability for some purpose or other is the very basis of the market value of all lands. . . .
>
> "If, however, entirely apart from the fact that the property was taken for a particular use, it appears that it was exceptionally adapted and available for such a use, as, for example, for a municipal water supply, or for a railroad, or for a bridge, and the necessity for such use was so imminent as to add something to the present value in the minds of possible buyers, that element may be considered in determining the fair market value." (Citing many cases.)

The Appellants in their offers of proof (Abstract pp. 130, 133, R. 3) showed that voluntary unitization of tracts

as large or larger than this gas storage field had been accomplished in Illinois and in Texas. The Appellants' offers were rejected by the trial court as were the offers of proof showing that other companies which have the right of condemnation were interested in purchase (Abstract pp. 129, 130, 133, R. 3).

c. The Illinois court asserted that the Appellants' property is of value only because of its strategic location, ignoring the comparatively rare and very useful underground formation which gives the property intrinsic value, and relied on the case of **United States v. Chandler Dunbar Water Power Co.**, 229 U. S. 53, 80. This case is completely inapplicable to the fact situation. In the offers of proof made by the Appellants, they were not seeking to value the underground gas storage rights in their land for their stategic location but rather for their intrinsic worth. In the Chandler Dunbar case, the court said that "strategic value . . . is based not upon the actual value for all reasonable uses and demands, but the possible worth of the property to the Government."

No attempt has been made in the evidence submitted by the Appellants to the trial court to appraise the rights sought by the Appellee based upon the need or the use by the Appellee. Rather, the Appellants submitted evidence based upon the actual fair cash market value of the gas storage rights, which value takes into consideration such elements as relative scarcity of such domes, capacity of the domes to earn (including the possible failure of the gas storage operation) and the prices paid in a free competitive market for comparable underground gas storage rights.

d. The Illinois court also stated that to value these rights for gas storage purposes is to show the value to the condemnor. The court is confused on this issue. The mere fact that the value for gas storage purposes is for the very purpose to which the Appellee intends to put this

strata does not prevent such use in valuation if the use is not peculiar to the condemnor but is because of some particular economic significance in the thing being taken. **Mississippi and Rum River Boom Company v. Patterson,** 98 U. S. 403.

The absurdity of this argument and its economic significance to the landowner is shown by likening it to the situation where a secondary recovery, waterflood operation is necessary to recover residual oil from a dome such as this one where the legislature had granted a utility the power of eminent domain to unitize the field. The utility, under the authority of this case, could say to the landowner—"I am the only one who can use your land. I have the permit, the strata is valuable only for the purpose to which I plan to put it and you cannot value it for that purpose." The landowner answers truthfully that it is of no value for any other purpose and the State Court then tells him—"this makes no difference, the granting of the permit makes your use of this land for this purpose speculative and conjectural and, besides, this is a case of necessity to the condemnor and you can't value the strata on the basis of the purpose to which he plans to put the land."

e. The Illinois court then asserts that the valuation of this land for gas storage purposes is speculative because no one knows for sure that the operation will be successful. The objection that expert opinion evidence in mineral cases should be excluded because it is too speculative was supposedly laid to rest by a series of cases commencing with **Montana Railway Co. v. Warren,** 137 U. S. 348, 352, 353:

> "The claim in controversy had been developed so far as to indicate that possibly, perhaps probably, the same rich vein extended through its territory. . . . That this mining claim, which may be called 'only a prospect', had a value fairly denominated a market

value, may as the Supreme Court of Montana well says, be affirmed from the fact that such 'prospects' are the constant subjects of barter and sale. Until there has been full exploiting of the vein its value is not certain, and there is an element of speculation, it must be conceded, in any estimate thereof. And yet, uncertain and speculative as it is, such 'prospect' has a market value; and the absence of certainty is not a matter of which the . . . (condemnor) can take advantage, when it seeks to enforce a sale . . ."

This contemplated use is no more speculative than the prospect of striking oil on a particular farm, yet no court in the presence of a forcible taking would suggest that a farmer be deprived of the increased value of his farm because of the possible presence of oil simply because the valuation of the farm involved educated guesses or appraisals by informed persons. There is no well defined market in underground gas storage space but the value of this dome can be measured by an engineering method (Abstract p. 133, R. 3) which is sufficiently accurate and precise to be relied upon by bankers in lending money (Abstract pp. 131, 132, R. 3), or it can be measured by comparable sales of underground gas storage rights in areas where all sales are voluntary because of the lack of an eminent domain statute (Abstract p. 135, R. 3). The fact that proof of damage (or value) is difficult should not justify confiscation without compensation.

CONCLUSION.

Whether the taking of these gas storage easement rights occurred at the time that the legislative commission, pursuant to statute, authorized the utility to store gas in the landowners' land or at the time when the judge excluded all evidence of the value of the rights taken, may be difficult to ascertain but this court, recognizing that "just compensation" means reimbursement to the landowner

for the property taken and that the word "just" evokes ideas of "fairness" and "equity" should end this legal shell game which has resulted in a jury finding that for valuable underground gas storage easement rights the landowner should receive just compensation of "no dollars".

The Appellants respectfully pray that the Supreme Court of the United States take jurisdiction of this appeal on the record in this case, and that Appellants be permitted to file briefs upon the merits in accord with the rules of this Court, and be permitted to make oral argument thereon, and this Court declare the Illinois Gas Storage Act as construed by the Supreme Court of Illinois to be repugnant to the Federal Constitution and enter judgment for the Appellants on the findings, or order that this case be retried with instructions that evidence be received as to the value of the underground gas storage easement rights for gas storage purposes in fixing the compensation due the Appellants.

Respectfully submitted,

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APPENDIX A.

Opinion Below.

Docket No. 38519—Agenda 49—May, 1964.

Midwestern Gas Transmission Company, Appellee, v. James H. Mason *et al.*, Appellants.

Mr. Justice House delivered the opinion of the court:

This is an action to condemn the right by easement to store natural gas in a strata underlying the 107-acre tract of the defendants James H. and Alta Mason; together with easements for a temporary well drill site, permanent well drill site and permanent access road. Defendants filed a traverse raising certain constitutional questions, and a cross petition seeking damage to property not taken. The jury returned verdicts for damages by virtue of the surface and drill site easements totalling $131.60, and $5,741.14 for damage to the remaining land of the defendants exclusive of the easements taken. The only verdict questioned on this appeal reads: "We, the jury, find that the just compensation to which the defendants are entitled for the depreciation in value of the strata composed of the New Albany shale, the Devonian and Silurian systems of rock for the permanent easement for the underground storage of gas is no dollars." Judgment was entered on the verdicts and this appeal followed.

A house and outbuilding are located on the defendants' tract, the house being rented on a month-to-month basis. Sixteen acres are either in or susceptible to cultivation and the remainder is devoted mostly to grass. Wells are producing oil from a shallower horizon than the strata here in question. Underlying the surface of this and contiguous land, comprising approximately 3600 acres, is a dome known as the Elbridge gas storage area which

plaintiff proposes to develop as a natural gas storage reservoir in the Devonian and Silurian limestone formations. These porous formations are approximately 1000 feet thick and are overlayed by the New Albany shale, the top of which is in excess of 1800 feet below the surface.

The Illinois Commerce Commission entered an order prior to this proceeding approving the development, operation and maintenance of a gas storage reservoir by plaintiff pursuant to the provisions of the Illinois Gas Storage Act. Ill. Rev. Stat. 1963, chap. 104, pars. 104-112.

Defendants complain that the commission's order granted a monopoly to plaintiff and thereby destroyed a potential market for the underground storage. They say this, coupled with the holding of *Peoples Gas Light and Coke Co. v. Buckles*, 24 Ill. 2d 520, holding that unique value and adaptability of the strata for gas storage cannot be considered, invalidates the Gas Storage Act as a violation of due process and the taking of property without compensation under section 13 of article II of our constitution. We understand their theory to be that failure of the gas storage act to provide for just compensation and its failure to provide a jury trial in connection with the Commission's proceedings renders the act unconstitutional.

While the charge of unconstitutionality was on different grounds in the *Buckles* case, it is inherent in that opinion that an exclusive right of eminent domain may, in some cases, be granted without violation of due process. It was pointed out that it would be futile to grant a certificate to more than one public utility since the usability as a storage reservoir rests upon a combination of a number of parcels.

The primary thrust of defendant's appeal is aimed at the measure of damages for the condemnation of a per-

manent easement for the underground storage of natural gas. Certain offers of proof by defendants were for the purpose of establishing the highest and best use of the property to be as a gas storage reservoir and to show the value to the condemnor. This subject was exhaustively treated in *Peoples Gas Light and Coke Co. v. Buckles*, 24 Ill. 2d 520, and that opinion is decisive here. The proffered evidence to establish the highest and best use of the land to be a gas storage reservoir was held to be too remote and speculative, and the measure of damages for impression of the easement was held to be the difference in the fair cash market value of the property before and after imposition of the burden of the easement.

The proof established the highest and best use of the property to be for a suburban home site, stock farming and oil production. Plaintiff's witnesses Scott and Schneider, testified that in their respective opinions damages for surface facilities totalled less than $100 and that the rock strata was valueless. Their valuations of the entire tract as of the date of filing the petition were $15,360 and $18,200 respectively, and $13,965.11 and $17,130 respectively after the taking. Defendants' witnesses, Kime and Syrcle, were of the opinion that the value before the taking was $45,135.46 and $42,000 respectively, and $27,728.86 and $23,900 respectively, after the taking. Each stated that he was not in a position to fix a value of the easement on the rock strata.

Plaintiff stipulated in open court that defendants shall not be restricted in their use of the property from the surface to the top of the New Albany shale and below the Silurian limestone, that plaintiff would pay any additional cost to defendants occasioned by its drilling (presumably referring to added cost of drilling, mining or reducing to possession oil or other minerals by defendants), and disclaimed any interest in any oil or other hydrocarbon

substances that may be found or subsequently reduced to possession in the Devonian and Silurian limestones. This stipulation is binding on plaintiff and was competent to abridge the claim by the landowners for damages. *East Peoria Sanitary Dist. v. Toledo, Peoria and Western Railroad,* 353 Ill. 296.

In summary, the offers of proof as to valuation of the land as a part of an underground gas storage reservoir were too remote and speculative and were properly excluded. The only competent evidence on value of the limestone structures was that they were valueless, and "just compensation" under section 13 of article II does not necessarily mean that some award must be made. See *Department of Public Works and Buildings v. Filkins,* 411 Ill. 304.

The record establishes the highest and best use of the property to be for residence, stock farming and oil production purposes. The jury viewed the premises, gave specific awards for damages by virtue of the surface easements (which are not in controversy), and an award of damages to land not taken. The verdict was within the range of the testimony and was not clearly and palpably wrong. There is neither contention nor proof that the verdict was the result of passion and prejudice. In such case we are not justified in disturbing the verdict of the jury. *Central Illinois Electric and Gas Co. v. Scully,* 17 Ill. 2d 348.

The judgment of the circuit court of Edgar County is affirmed.

Judgment affirmed.

APPENDIX B.

Statutory Provision.

TRANSPORTATION, DISTRIBUTION OR STORAGE OF GAS

AN ACT concerning the use of eminent domain in connection with the transportation, distribution, or storage of gas, and granting rights for the storage of gas in property of the State of Illinois and political subdivisions, municipal corporations and quasi-municipal corporations therein. Filed June 21, 1951. L.1951, p. 395.

Be it enacted by the People of the State of Illinois, represented in the General Assembly:

104. Acquisition by condemnation proceedings of private property by corporations distributing, transporting or storing gas.] § 1. Any corporation which is engaged in or desires to engage in, the distribution, transportation or storage of natural gas or manufactured gas, which gas, in whole or in part, is intended for ultimate distribution to the public in the State of Illinois, if the said business of such corporation is regulated or subject to regulation under either the laws of the State of Illinois or the laws of the United States, shall have the right to enter upon, take, or damage private property or any interest therein, in the manner provided for by the law of eminent domain, necessary or convenient for its said operations, including the storage of gas, all of which operations are hereby recognized and declared to be affected with a public interest and all of the property used in which operations is hereby recognized and declared to be devoted to public use.

105. Order approving proposed storage project required —Liability insurance.] § 2. Before the right of condemnation may be exercised for the acquisition of property, or any interest therein, for underground storage of gas, said corporation shall make application to the Illinois Commerce Commission (hereafter referred to in this Act as the Commission) for an order and must receive an order approving the proposed storage project. No such order shall be issued by the Commission unless it shall contain and be based on findings that the proposed storage will be confined to geological stratum or strata lying more than five hundred feet below the surface of the soil; that the proposed storage will not injure any water resources; that the proposed storage will involve no condemnation of any interest in any geological stratum or formation within the area of the proposed storage project containing oil, gas or coal within such area in commercial paying quantities, producible through primary production methods, either with or without pressure maintenance, or secondary recovery methods of any type; that the public convenience and necessity of a substantial portion of the gas consuming public in the state will be served by such acquisition; and unless said order contains conditions and restrictions which will reasonably protect:

(a) private property or any interest therein not appropriated;

(b) the rights of the owners of the lands lying within the boundaries of said proposed storage area or persons claiming under them, or of the owners of the minerals thereunder or those claiming under them to explore for, drill for, produce, develop, conduct secondary recovery operations (such as water-flood or gas injection operations) for the recovery of oil or gas on or under said lands, or to drill wells on said lands for the development and production of water or the disposal of salt water, fresh water or waste matter, all from or into strata other than any stratum to be condemned for gas storage.

(c) any public resources of the state which may be affected by such use.

The Commission shall in such order require such corporation to carry public liability insurance in an amount determined by the Commission, with an insurer satisfactory to the Commission, or at the election of the corporation to deposit collateral approved by the Commission in an amount determined by the latter, to secure payment of any damage resulting from any occurrence arising out of or caused by operation or use of the gas storage reservoir. The Commission order shall require that such insurance be maintained for a term of ten years from the date of the beginning of operation or use of the project and that such corporation appear before it not less than 90 days prior to the expiration of such ten year term and show cause why such insurance should not be renewed for an additional term of ten years with a like obligation on the corporation as to further renewal at the end of such latter term. Such procedure shall apply thereafter for successive ten year terms so long as the Commission continues to require such insurance.

106. Notice of hearing on application.] § 3. Upon the filing of the application specified in Section 2[1] hereof, the Commission shall set a date for a hearing thereon, and said corporation shall thereupon cause notice of said hearing to be given by publishing notice thereof at least once each week for three successive weeks in some newspaper of general circulation in the county or counties wherein the gas is proposed to be stored, the first such publication to be at least 21 days prior to the date of the hearing. Any order approving the proposed storage project shall not be operative against any privately owned interest in any tract of land, unless notice of said hearing be sent at least 21 days prior thereto by registered mail to the

[1] Section 105 of this chapter.

record owner thereof to his last known address as disclosed by the records of the Tax Collector of the county wherein such land is located, proof of which shall be made by affidavit filed in the proceeding.

107. Hearing on application.] § 4. At the hearing on said application, the Commission shall receive and hear and make a record of such relevant evidence on the issues as may be offered by any person directly interested, and shall enter an order either granting or denying the relief sought, which order shall specify the Commission's findings and directions on the relevant issues and conditions listed in Section 2[1] hereof.

108. Action to test lawfulness of order—Appeal.] § 5. Any person directly affected by the order of the Commission shall have the right to bring a civil action to test the lawfulness and reasonableness of said order by filing a complaint in the Circuit Court of the county in which the proposed storage area or any part thereof, may lie, against the Commission or the members thereof as defendants, for review of such order. Such action shall be brought within thirty (30) days of the entry of the order by the Commission and in the event no such action is filed within said time, the order of the Commission shall be final. In such action the Court may stay the order of the Commission until the court shall enter its decree. In such action the burden of proof shall be upon the party complaining of such order and such order shall be deemed prima facie valid. Any person directly interested in the subject matter may, in the discretion of the court, be permitted to intervene in such action. Any party to such action may offer in evidence all or any part of the record of the hearing before the Commission, and any other relevant evidence. The practice, pleading and proceedings in such action, which shall be equitable in nature, shall con-

[1] Section 105 of this chapter.

form to the rules prescribed by the Civil Practice Act[1] as far as the same may be applicable. The court shall have jurisdiction to enter a decree affirming or setting aside said order, or remanding the cause to the Commission with directions to modify such order so that it shall conform to the provisions of this Act.[2] Said action shall have precedence over other matters before the Court. Appeals may be taken by any party to such action in the same manner and to the same extent as in other civil actions.

109. Lands owned by State or political subdivisions, use of—Compensation.] § 6. Upon receiving an order approving such gas storage project, such corporation shall have the right to utilize for the storage project so approved any geological stratum or formation required thereby, lying more than five hundred feet below the surface (but not including the surface) of any real estate owned by the State of Illinois, or owned by any political subdivision, including, but not restricted to, any municipal corporation or quasi-municipal corporation, of the State of Illinois. Such corporation shall as a condition of such utilization of real estate owned by such a political subdivision pay thereto compensation in an amount ascertained in the manner provided by the law of eminent domain. Such corporation shall as a condition of such utilization of real estate owned by the State of Illinois pay to the State Treasurer a reasonable compensation therefor in such amount as may be determined by the Illinois Commerce Commission.

110. Rights granted are in addition to other rights—Effect of application.] § 7. The rights herein granted shall be in addition to any right now possessed by any public utility to condemn property for use in its operations. The filing and prosecution before the Illinois Com-

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[1] Chapter 110, § 1 et seq.

[2] Sections 104-112 of this chapter.

merce Commission of an application pursuant to the rights granted hereby shall not subject such corporation to any regulation by that Commission or by law not otherwise applicable, or excuse it from any applicable law or regulation.

111. Partial invalidity.] § 8. If any section, paragraph, sentence or phrase of this Act[1] shall be declared unconstitutional, or void for any reason by any court of final jurisdiction, such fact shall not in any manner invalidate or affect any other section, paragraph, sentence or phrase of this Act, but the same shall continue in full force and effect.

112. Act ineffective on and after July 1, 1976.] § 9. On and after July 1, 1976, the provisions of this bill shall be ineffective.

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[1] Sections 104-112 of this chapter.

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No. 759

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

JAMES H. MASON and ALTA MASON,
Appellants,

vs.

MIDWESTERN GAS TRANSMISSION COMPANY,
Appellee.

On Appeal From The Supreme Court
of the State of Illinois

MOTION OF APPELLEE TO DISMISS

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Appellee.

On Appeal From The Supreme Court of the State of Illinois

MOTION OF APPELLEE TO DISMISS

Pursuant to Rule 16(1) of the Revised Rules of this Court, appellee, Midwestern Gas Transmission Company, moves that the appeal be dismissed.

STATEMENT.

Appellants seek to appeal from a judgment of the Supreme Court of Illinois affirming a trial court's award of compensation in an eminent domain case in which appellee obtained certain easements for underground gas storage in land owned jointly by appellants. The sole issue before the court below was the propriety of the exclusion by the trial court of certain evidence appellants sought to introduce on the question of just compensation.

Appellee is engaged in the business of purchasing, transporting and selling natural gas in interstate commerce, and as such is a "natural-gas company" subject to the jurisdiction of the Federal Power Commission under the Natural Gas Act §§ 1-2, 52 Stat. 821 (1938), as amended, 15 U.S.C. §§ 717-17a. (Abs. 12, 154.) In this connection, appellee is attempting to develop an underground gas storage reservoir in Edgar County, in east central Illinois. (Abs. 12, 155.)

The underground gas storage reservoir will be developed in subsurface formations which are shaped like a gentle dome. Gas will be injected from the surface into relatively porous limestone formations, which are directly beneath an impermeable shale formation. The shale cap rock is expected to prevent the horizontal and upward migration of the gas. This shale cap rock at its apex is more than 1,800 feet below the land surface. The storage dome underlies approximately 3,200 acres of land. (Abs. 21-26, 29-34, 11[illegible]13, 155.)

The Federal Power Commission has granted appellee a Certificate of Public Convenience and Necessity authoriz-

ing the development of this underground dome for the storage of natural gas. (Abs. 60.)

Appellants own a 107 acre tract overlying a portion of the dome. (Abs. 109, 156.) Appellee sought unsuccessfully to purchase from appellants easements in this tract for the construction and maintenance of a gas storage well and a road leading to the well site, and for the storage of natural gas in the above-specified geological formations. (Abs. 61-62, 155-58.) Appellee then instituted a proceeding, under the Illinois Gas Storage Act, ILL. REV. STAT., ch. 104, §§ 104-12 (1963), before the Illinois Commerce Commission seeking authorization to bring an action under the Illinois Eminent Domain Act, ILL. REV. STAT., ch. 47, §§ 1-17 (1963), to acquire such easements. (Abs. 9-10.)

Under section 3 of the Illinois Gas Storage Act, appellee was required to publish notice of the proceeding before the Illinois Commerce Commission and to send notice by registered mail to appellants, at least 21 days prior to the hearing. ILL. REV. STAT., ch. 104, § 106 (1963). Appellee complied with such notice requirements (Abs. 12-14), and Mr. James H. Mason, one of appellants, participated in the hearings before the Illinois Commerce Commission (Abs. 11).

Upon the conclusion of the hearings, the Illinois Commerce Commission issued an order authorizing appellee to acquire, by eminent domain, the easements necessary for this gas storage project. (Abs. 9-47.) Under section 5 of the Illinois Gas Storage Act, appellants had the right to appeal to the courts from the Commission's order by bringing a civil action "to test the lawfulness and reasonableness" of the order. ILL. REV. STAT., ch. 104, § 108 (1963). Appellants did not exercise this right, and no such action was brought.

Appellee then brought the present action in the Circuit Court of Edgar County, Illinois, under the Illinois Eminent Domain Act, ILL. REV. STAT., ch. 47, §§ 1-17 (1963), which is the general eminent domain statute in Illinois utilized by governmental bodies and public service corporations alike. (Abs. 1-2.)

At the trial, evidence was introduced showing that appellants' land was used as pasture, as a homesite, and for the production of oil. (Abs. 109.)

Appellee and appellants introduced evidence on the present fair cash market value of appellants' land, the fair cash market value of the land after the easements sought by appellee had been impressed upon the fee, and the fair cash market value of the easements for the well site and access road. (Abs. 114, 121, 127-28, 136, 137.) The evidence showed that the underground formations in which appellee sought gas storage easements had no value. (Abs. 114, 121.)

The evidence also showed, and appellants admitted, that the underground gas storage project would not affect the oil production from this land, since the oil is produced from formations above the cap rock of the storage project. (Abs. 137; Add. Abs. 3.) Appellee entered into a binding stipulation that appellants would not be restricted in the use of their property above and below the specific geological formations which make up the gas storage project, that appellee would pay for any additional drilling cost to appellants caused by appellee's gas storage operations, and that appellants would retain title to all native hydrocarbon substances in the storage structure. (Abs. 67b-68, 158-59.)

Appellants attempted to introduce evidence for the express purpose of showing the value of the entire gas storage dome and the value of their land as part of that dome. (Abs. 68-69, 128.) The trial court sustained appellee's objection to this evidence on the basis of the decision of the Supreme Court of Illinois in *Peoples Gas Light & Coke Co. v. Buckles*, 24 Ill. 2d 520, 182 N.E.2d 169 (1962), *appeal dismissed & cert. denied*, 371 U.S. 185 (1963), holding evidence of this type to be "too remote and speculative." (Abs. 69, 128.)

The jury returned a verdict making the following award to appellants (Abs. 59, 137-38):

> Just compensation for the 0.115 acres for the permanent well site is $50.00.
>
> Just compensation for the depreciation in value of the 0.108 acres for the permanent easement for the access road is $21.60.
>
> Just compensation for the depreciation in value of the 1.894 acres for the easement for the temporary well site is $60.00.
>
> Just compensation for the depreciation in value of the shale and limestone strata for the permanent easement for the underground storage of natural gas is no dollars.
>
> Just compensation for the damage to the remaining land of appellants, exclusive of the easements taken, is $5,741.14.

Thus, the jury awarded appellants a total of $5,872.74, of which $5,741.14 was compensation for the depreciation in the value of appellants' land because of the granting of the easements for underground gas storage and related facilities. The trial court entered judgment granting this compensation to appellants and the easements to appellee. (Abs. 138, 149-64.)

Appellants appealed to the Supreme Court of Illinois, which found that the "proof established the highest and best use of the property to be for a suburban home site, stock farming and oil production"; that the evidence offered by appellants to establish the value of this property as part of an underground gas storage reservoir was "too remote and speculative" and therefore was properly excluded by the trial court; and that the jury verdict "was within the range of the testimony and was not clearly and palpably wrong." The Supreme Court of Illinois, on the basis of these findings and its 1962 decision in the *Buckles* case, affirmed the judgment of the trial court. 31 Ill. 2d 340, 342-43, 201 N.E. 2d 379, 381 (J.S. 23-24).

ARGUMENT.

The questions which appellants urge before this Court are simply not involved in this case. Central to all three questions raised by appellants (J.S. 3) is the assumption that the court below held that appellee could store gas under appellants' land without payment of compensation because appellee had secured exclusive authority from the State of Illinois, under the Illinois Gas Storage Act, to develop this underground gas storage reservoir. The court below made no such holding.

Appellants were awarded $5,741.14 for the depreciation in the value of their land for residential, farm and mineral purposes caused by the grant to appellee of easements for the storage of gas and the related well and road facilities. (Abs. 59, 138.)

Appellants were not permitted to introduce evidence of the value of the underground gas storage reservoir on the ground that such evidence was too remote and specu-

lative. (Abs. 69, 128.) This action was taken by the trial court and affirmed by the court below on the basis of the latter's decision in *Peoples Gas Light & Coke Co. v. Buckles*, 24 Ill. 2d 520, 182 N.E.2d 169 (1962), *appeal dismissed & cert. denied*, 371 U.S. 185 (1963), which in turn was based on decisions of this Court that a use of property which is possible only upon the combination of that property with the property of others must be considered in determining the value of that property only when such combination has been shown to be a reasonable probability. (Abs. 69, 128); 31 Ill. 2d 340, 342-43, 201 N.E.2d 379, 381 (J.S. 23). In *Buckles*, as additional reasons for holding the evidence there excluded to be too remote and speculative, the court pointed to the untested feasibility of the dome as a gas storage reservoir and to the unlikelihood that the Illinois Commerce Commission, having already issued a Certificate of Public Convenience and Necessity to one utility to develop the dome, would issue a second certificate to any of the alternative developers to which the landowner there alluded. 24 Ill. 2d 520, 538-39, 182 N.E. 2d 169, 179.

The actual decision of the court below, as opposed to that fictitiously imputed to the court by appellants, is not reviewable by appeal nor worthy of review by writ of certiorari.

1. *Appeal is improvidently sought.* Appellants seem to believe (J.S. 2, 3) that this Court has jurisdiction to review the decision below on the ground that the validity of the Illinois Gas Storage Act was "drawn in question" within the meaning of 28 U.S.C. § 1257(2). That provision authorizes review by this Court by appeal, as opposed to writ of certiorari, "where is drawn in question the validity of a statute

of any state on the ground of its being repugnant to the Constitution . . . , and the decision is in favor of its validity."

The Illinois Gas Storage Act establishes a procedure by which public service corporations can obtain the power of eminent domain. ILL. REV. STAT., ch. 104, §§ 104-05 (1963). The power of eminent domain once so obtained must be exercised under the Illinois Eminent Domain Act, ILL. REV. STAT., ch. 47, §§ 1-17 (1963). The instant case is under the Eminent Domain Act, not the Gas Storage Act.

The only decision properly attributable to the court below is that evidence of the value of appellants' land as part of an underground gas storage reservoir was inadmissible because there was no reasonable possibility that appellants' land could be combined with the land of others to form the necessary storage dome. 31 Ill. 2d 340, 342-43, 201 N.E.2d 379, 381 (J.S. 23-24). If such a decision can be said to involve any statute, which in itself is a startling proposition for which appellants cite no authority, that statute would have to be the Illinois Eminent Domain Act under which the present case was brought. Appellants, however, have never contended, here or below, that the Eminent Domain Act, as distinguished from the Gas Storage Act, has been drawn in question.

Appellants argue (J.S. 15-16) that the court below by its favorable citation of the *Buckles* decision applied in this case the analysis advanced in *Buckles* that use of the land in question as part of an underground gas storage reservoir was too remote and speculative for the additional reason that it was unlikely the Illinois Commerce Commission, having already issued a Certificate of Public Convenience and Necessity to one utility to develop

the dome, would issue a second certificate to any of the other utilities to which the landowner there alluded, 24 Ill. 2d 520, 538, 182 N.E.2d 169, 179.

Whether or not this analysis in *Buckles* turned on the fact that the outstanding certificate had been issued by the Illinois Commerce Commission, which fact was not present in the instant case, this analysis, if it involves any statute, involves the certificating statute, not the Illinois Gas Storage Act. Before any utility subject to the Illinois Public Utilities Act can acquire and operate a facility such as the present storage project, it is required by that statute to secure a Certificate of Public Convenience and Necessity from the Illinois Commerce Commission. ILL. REV. STAT., ch. 111⅔, § 56 (1963). Interstate pipeline companies such as appellee, although not subject to this state requirement, *Wilcox v. Illinois Commerce Comm'n*, 23 Ill. 2d 432, 178 N.E.2d 873 (1962), are required by the Natural Gas Act to obtain a similar certificate from the Federal Power Commission. § 7(c), 52 Stat. 824 (1938), as amended, 15 U.S.C. § 717f(c). Appellants have never contended that the Illinois Public Utilities Act or its federal counterpart the Natural Gas Act has been drawn in question by the decision below.

Moreover, whatever statute may be involved in the "unlikelihood of a second certificate being granted" analysis of *Buckles*, that statute cannot be said to have been drawn in question by the decision in *Buckles* inasmuch as that analysis was merely a cumulative ground for the holding in that case that the proffered evidence of value was too remote and speculative, 24 Ill. 2d 520, 534-40, 182 N.E. 2d 169, 177-80, which holding was, as shown below, supported by an unrelated, independent and adequate ground.

Cf., e.g., Lynch v. New York ex rel. Pierson, 293 U.S 52 (1934).

In short, any conceivable statute which could have been involved in the decision below has not been and is not being challenged by appellants. The only statute they challenge, *i.e.*, the Illinois Gas Storage Act, not only was not involved in this case but could not be challenged in this case. The proper place to challenge the Illinois Gas Storage Act was in the proceeding under that Act which preceded the instant case. Appellants were given notice of that proceeding; one of appellants participated in that proceeding; and, at the time of that proceeding, the decision in the *Buckles* case had already been handed down by the Supreme Court of Illinois. Yet, appellants made no attempt in that proceeding to raise the defects which they now claim to see in the Illinois Gas Storage Act nor did they exercise their rights expressly granted by that Act to bring a court action to test the lawfulness of the Commission's order. ILL. REV. STAT., ch. 104, § 108 (1963). As pointed out in the *Buckles* case, appellants "cannot now collaterally attack the order" of the Illinois Commerce Commission granting the power of eminent domain. 24 Ill. 2d. 520, 528, 182 N.E.2d 169, 174.

Even if the Illinois Gas Storage Act could be said to have been drawn in question by the decision below, the question thus presented is not the substantial federal question which must be presented to appeal to this Court. *Zucht* v. *King*, 260 U.S. 174, 176, 177 (1922). The decisions of this Court clearly authorize the exclusion of evidence of the value of appellants' land as part of an underground gas storage reservoir for the reason that the combination of their land with the land of others to form the necessary

underground dome was not a reasonable possibility.[1] In *United States ex rel. T.V.A. v. Powelson*, 319 U.S. 266, 275-76 (1943), this Court explained:

> "An owner of lands sought to be condemned is entitled to their 'market value fairly determined.' *United States* v. *Miller*, 317 U.S. 369, 374. That value may reflect not only the use to which the property is presently devoted but also that use to which it may be readily converted. *Boom Co.* v. *Patterson*, 98 U.S. 403; *McCandless* v. *United States*, 298 U.S. 342. In that connection the value may be determined in light of the special or higher use of the land when combined with other parcels; it need not be measured merely by the use to which the land is or can be put as a separate tract. *McGovern* v. *New York*, 229 U.S. 363. But in order for that special adaptability to be considered, there must be a reasonable probability of the lands in question being combined with other tracts for that purpose in the reasonably near future. *Olson* v. *United States*, 292 U.S. 246, 255. In absence of such a showing, the chance of their being united for that special use is regarded 'as too remote and speculative to have any legitimate effect upon the valuation.' *McGovern* v. *New York, supra*, p. 372."

There has been no contention or showing that the circumstances of the instant case are significantly different than those present in the above-quoted decision and the cases therein cited. Here, appellants owned less than 4% of the minimum area necessary to form the gas storage reservoir. Moreover, even if the court below was factually mistaken on the reasonableness of the possibility of combining the parcels necessary to form the storage reservoir, such a debatable misapplication of an accepted formula

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[1] As discussed above, it is not necessary to consider the validity of the additional grounds suggested in *Buckles* in support of the exclusion of such evidence inasmuch as those grounds were cumulative grounds for the conclusion that the evidence was too remote and speculative.

does not raise a substantial federal question. *Cf., e.g., McGovern v. City of New York*, 229 U.S. 363, 370-72 (1913); *Roberts v. New York City*, 295 U.S. 264, 277-78 (1935).

2. *The questions presented do not warrant review by certiorari.* As discussed above, the decision below is in accord with the decisions of this Court. The most that appellants can say is that the court below incorrectly applied well-defined principles to the particular facts presented here. This Court has already refused to review the *Buckles* decision which contains the analysis which appellants believe aggrieves them and which they attempt to incorporate into this case on the strength of the favorable citation of the *Buckles* case by the court below. *Peoples Gas Light & Coke Co. v. Buckles*, 24 Ill. 2d 520, 182 N.E.2d 169 (1962), *appeal dismissed & cert. denied*, 371 U.S. 185 (1963).

Nor is the decision below in conflict on the requirements of the federal Constitution with the decisions of the courts of the states of Kentucky and West Virginia as suggested by appellants. Neither *Milby* v. *Louisville Gas & Elec. Co.*, 375 S.W.2d 237 (Ky. 1964), nor *United Fuel Gas Co.* v. *Allen*, 137 W. Va. 897, 75 S.E.2d 88 (1953), purport in any way to be based upon the requirements of the federal Constitution or the decisions of this Court interpreting those requirements. Thus, even if there were a conflict, which there does not appear to be,[2] between the ruling of the

[2] The evidence admitted in the Kentucky and West Virginia cases concerned the nominal rentals being paid for comparable underground storage rights in the area and was offered by the condemnors themselves *for the purpose* of showing the actual market value of underground storage rights. The evidence excluded in the instant case concerned primarily the value of an underground gas storage reservoir and was offered by appellants *for the purpose* of constructing a value for underground storage rights. (Abs. 68-108.)

court below and those of the Kentucky and West Virginia courts on the admissibility of certain evidence, such a variance in views would not mean that these courts are placing different interpretations on the federal Constitution. *Cf. Ruhlin* v. *New York Life Ins. Co.*, 304 U.S. 202, 206 (1938).

CONCLUSION.

The appeal should be dismissed because the decision below did not draw in question the validity of the Illinois Gas Storage Act, nor does it present a substantial federal question. If the appeal is treated as a petition for writ of certiorari, the decision below, involving the application of well-defined principles to the particular facts of this case, is not in conflict, insofar as the Constitution is concerned, with the decisions of this Court or any other court.

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No. 759.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1964.

JAMES H. MASON and ALTA MASON,
Appellants,

vs.

MIDWESTERN GAS TRANSMISSION COMPANY,
a Corporation,
Appellee.

On Appeal from the Supreme Court of the State of Illinois.

BRIEF

Of Appellants in Opposition to Motion to Dismiss.

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BRIEF

Of Appellants in Opposition to Motion to Dismiss.

Pursuant to Rule 16 (3) of the Revised Rules of this Court, Appellants file this brief in opposition to the motion of Appellee to dismiss.

STATEMENT OF FACTS.

The Appellee has misinterpreted the facts. Appellee states that this appeal is from a judgment awarding compensation. This is a misunderstanding, the appeal is only from that portion of the judgment which awards no compensation for the thing taken being exclusive easement rights for underground gas storage in a particular strata of rocks.

Appellee also states that the issue before this Court is the propriety of the exclusion of certain evidence of value. This is a misunderstanding, the issue is as to the propriety of a court excluding all evidence of value.

Appellee also states that the Appellants had the right to appeal the order of the Illinois Commerce Commission. This is totally irrelevant because that commission did not have the power to fix compensation, nor did it.

Appellee infers that Appellants introduced evidence on a before and after basis as to the whole farm. This is a misunderstanding, the Appellants introduced such evidence only after excluding the value of the strata for the underground storage of gas (Abs. 128, 136). The only evidence which the court allowed the jury to hear as to the value of the thing taken was that of Appellants and their two experts testified that they had no background or knowledge in regard to underground gas storage (Abs. 116, 122). And, Appellant's own witness testified that the only value of the thing taken was for the underground storage of natural gas (Abs. 125).

Appellee states that Appellants attempted to introduce evidence as to the value of the whole dome but fails to state that Appellants also attempted to introduce evidence of a comparable sale (Abs. 134, 135).

Appellee recites the jury verdict but fails to state that the only appeal is from the verdict of "no dollars" for the shale and limestone strata taken for the permanent easement for which no compensation was awarded to the Appellants.

ARGUMENT.

The Excluded Testimony.

This appeal is based upon the failure of the court below to award any compensation to the landowners for the thing actually taken—the exclusive, perpetual right to store gas in a rock strata 1000 feet below the surface of the 107 acre farm of the Appellants. As stated by the Appellee at page 5 of its brief, the court excluded all evidence offered by the Appellants of the value of this strata. The evidence included the testimony of these men:

Eskil J. Bjork, former President and Chairman of the Board of Peoples Gas Light and Coke Company, of Chicago, that (Abs. 71-72): "There have been no sales of underground gas storage strata comparable to the property which Midwestern Gas Transmission Company is seeking to condemn in the Mason land in the Elbridge dome in Edgar County, Illinois . . . He knows of no use which can be made of the sub-surface dome structure which Plaintiff seeks to acquire in the Elbridge area, other than for the storage of natural gas . . . The discovery of the Elbridge dome together with the geological work in connection with that discovery had the effect of increasing the value of the land which included the dome . . . There are several companies in Illinois that would have an interest in purchasing the Elbridge dome structure at its present stage of development."

Allen Van Wyck, President of Illinois Power Company for over twenty years, that (Abs. 74): "He knows of no sales of underground gas storage areas or domes in the State of Illinois . . . If an underground gas storage area were available for purchase, his company would be interested in examining it."

Carl Sherman, a petroleum engineer employed by the State of Illinois with the Illinois Geological Survey, that (Abs. 75): "In 1959, there were about 15 to 20,000 acres involved in a water flood operation, and the total acreage involved in water flood operation in Illinois in 1959, was 140,000 and the largest single operation under water flood was the Salem project, which had a surface acreage of about 7800 acres and this surface consisted mainly of small farms with a large number of landowners involved . . . The power of Eminent Domain was not used to get the landowners together, but this operation was accomplished by the voluntary agreement of all of the landowners."

Emery A. Manlove, Vice-President in charge of operations for Peoples Gas Light and Coke Company, that (Abs. 75-76): "He knows of no scale or measuring device used in the industry for valuing an underground storage facility . . . It is simply a matter of judgment as to the value of an underground gas storage facility . . . The exploratory activities in a search for underground gas storage are being conducted in Illinois by the Peoples Gas Light and Coke Company, Northern Illinois Gas Company and Panhandle and Eastern Pipeline companies."

Ambrose Harbert, Vice-President of City National Bank of Centralia, Illinois, that (Abs. 77): "If his bank were asked to make a loan for the development of an underground gas storage dome, they will not attempt to appraise it, but would go to a geologist and get his reports. . . . Appraisals by a firm such as Oliver & West, Inc., are the criteria of value in the industry, and the firm of Oliver & West, Inc., of Dallas, Texas, is considered qualified in the appraisal field."

Donald Flanagan and William Frank West, petroleum engineers with Oliver & West, Inc., of Dallas, Texas, that (Abs. 79-80): "Upon being furnished with the basic geological data, such as the report of the Illinois Geo-

logical Survey, the United States Geological Survey information, the data presented in the Illinois Commerce Commission hearing in this cause, and data he would acquire by independent examination and study, he could become familiar with the Mason property in such a way as to estimate the value of the underground gas storage rights in the Mason property, much as he became familiar with the Buckles property as indicated in the report which is made a part of this offer as Exhibit A (Abs. 85-108) and could produce the information and the appraisal of value of the type attached to this offer of proof as Exhibit A and entitled 'Appraisal of Gas Storage Value (St. Peter sandstone), Mahomet Dome, Champaign County, Illinois'. . . . Based upon his background experience and familiarity with the Mason property, he would have an opinion based upon a reasonable degree of scientific certainty as to its highest and best use on October 25, 1962, and it would be his opinion that the highest and best use of the Mason property is for the underground shortage (storage) of natural gas. . . . His opinion as to the fair market value of the Mason land before the taking would be the value of the land for farm purposes, plus the value of the underground gas storage rights plus the value of the mineral rights and the value of the land after the taking would be the fair market value of the land for farm purposes plus the value of the mineral rights, less any depreciation in each of those values by reason of the underground gas storage use. . . . . He has had extensive experience in getting together many landowners on a voluntary basis to work together on a project, due to the fact that there is no compulsory unitization in Texas and in order to conserve natural resources by unitization, it has meant getting together all of the landowners in a particular area on a voluntary or cooperative basis and this has been done repeatedly by his firm in projects involving large numbers

of owners and it is his opinion that there would be a minimum of difficulty in securing the voluntary cooperation of all of the landowners providing a fair approach is made to valuation. . . . If the plaintiff in this proceeding were not interested in the Elbridge formation, there would be a demand by others for the facilities provided by this formation. . . . The use that is being made of the surface has no relationship to the value of the underground gas storage area. . . . An appraisal of the type referred to above, is the engineering approach to the valuation of reservoirs of the type of the Elbridge dome and is commonly used in all appraisal work of this type."

Donald Flanagan and Carl Sherman, that (Abs. 81-82): "There is no underground gas storage facility which has been developed in the State of Illinois prior to the enactment of the Underground Gas Storage Act in Chapter 104, Sections 104-112, inclusive, Ill. Rev. Stat. 1961. . . . That outside of the State of Illinois and in the states where there is no power of Eminent Domain, there have been a number of voluntary sales and purchases of easement rights for gas storage purposes by persons to corporations desiring to utilize underground strata for gas storage purposes and that these sales outside the State of Illinois of easement rights, are comparable to the rights being acquired here."

C. Oscar Berry, Vice-President and General Counsel of Washington Gas Light Company of Washington, D. C., testified that (Abs. 83) without the power of eminent domain his company has acquired the rights for an underground gas storage operation, and (Abs. 84) "In 1961 the company made a further change increasing the outright purchase price of the easement from $50.00 per acre to $100.00 per acre in addition to the bonus payment of $300.00 per landowner."

It is our position that the exclusion of this evidence was error and it was an error which this court should correct because it is all of the evidence and the only evidence available to prove value and to deny its admissibility is to deny the landowners compensation. If there were any other evidence of value, the Appellee would have produced it. Under Illinois law "in eminent domain proceedings the burden is on the petitioner to prove the fair cash market value of the property to be taken. . . ." I. L. P., Eminent Domain, § 120, and the Appellee introduced only the evidence of no value by men who acknowledged no knowledge. If these easement rights had, in fact, no value, why does the Appellee seek them? Why does the evidence offered show that competing companies are interested in purchasing them? Why are able petroleum engineers willing to risk their reputations in giving an appraisal of this value on the open market?

The Illinois Gas Storage Act Is Unconstitutional.

The Appellants maintain that the failure to award compensation to the landowners is unconstitutional because it violates due process. Whether this failure is because of an unconstitutional interpretation of the Illinois Gas Storage Act (J. S. p. 26) or because of arbitrary and unreasonable evidentiary rulings is immaterial in judging the wrong to the landowners.

If the court based its rulings on the fact that the Appellee had secured an order from the Illinois Commerce Commission and therefore it was unlikely that anyone else could secure such an order, then the Illinois Gas Storage Act is unconstitutional not as it is written but as it is interpreted by the court. This interpretation grants the exclusive right to condemn which means that the landowner lost something when the order was entered and he lost something without a forum to assert his right to com-

pensation. A statute which is construed to establish a "single bidder" rule resulting in the rejection of evidence by all others, amounts to a clear taking of property without compensation. In **Pennsylvania Coal Company v. Mahon**, 260 U. S. 393, where a coal company had sold the surface of land but reserved an exclusive right to mine under it irrespective of damages caused, and such mining was thereafter forbidden by a Pennsylvania statute, the court stated at page 414:

> "To make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it."

That is true here if the purchase is limited to a single person. The court then went on to say, at page 415:

> "The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."

Perhaps the closest case to the legal situation here propounded was **Grand River Dam Authority v. Grand-Hydro**, 335 U. S. 359, where the court quoted the Oklahoma Supreme Court at page 369:

> "The state cannot, through its law-making body, remove the principal value of private property and, through its established agency acquire the property by condemnation, fixing the reimbursement to the owner on the reduced value."

An Award of "No Dollars" Raises a Substantial Federal Question.

The Appellee says that the sole question is as to the adequacy of the compensation and this raises no substantial Federal question. Our compensation is not inadequate, it is non-existent.

The cases cited by the Appellee on the proposition that there is no Federal question in mere inadequacy of compensation, **McGowen v. City of New York**, 229 U. S. 363, and **Roberts v. New York City**, 295 U. S. 264, are both cases where it would appear that the court would have granted relief if this case had been under consideration. At page 371 of the McGowen case the court said:

> "The final judgment of a state court ought not to be held in violation of the due process of law enjoined by the Fourteenth Amendment unless by the rulings upon questions of law the company was prevented from obtaining substantially any compensation."

And, in the other case cited on this point by the Appellee, **Roberts v. New York City**, 295 U. S. 264, 277, the court says:

> "To bring about a taking without due process of law by force of such judgment, the error must be gross and obvious, coming close to the boundary of arbitrary action."

We submit that rulings preventing any appraisal of the property taken for the only purpose for which it can be used resulting in a judgment of no compensation for the thing taken are gross, obvious and arbitrary.

Comparable Sale Valuation.

The landowners, in offering evidence as to just compensation, used two theories of valuation—comparable sales and net income.

The comparable sales technique was difficult because there have been no sales in II. . . except under threat of condemnation. The Appellants did find voluntary sales of underground gas storage rights in Maryland

which were comparable and offered evidence thereof which the court refused to admit. The Court therefore found, as a matter of law, that the sales were not comparable. The Appellee apparently overlooked this offer in stating that the theory of the landowners on valuation was dependent on the combination of parcels.

Net Income Valuation.

The other theory of valuation by the landowners depended on the combination of the parcels and the Appellee would interpret the court's decision as finding that as a matter of law there could be no combination of the 3200 acres involved. If this is the reasoning of the court in denying any compensation to the landowner then the ruling is contrary to every case the Supreme Court has decided on this subject including those cited by the Appellee.

In the first place the Appellee is ignoring the fact that with this decision the 3200 acres is combined. The thing that the court said as a matter of law could not be done, has been done.

Let us assume that the Appellee meant to say that, absent the power of eminent domain, the 3200 acres could not be combined. Normally this court will not overrule a state court on a matter of evidence relating to the adequacy of compensation but this ruling meant not that the landowners received inadequate compensation but that the landowners received nothing.

The cases on combination cited by the Appellee do not say that as a matter of law the possibility of combination of 3200 acres is so remote as to make evidence of value based on that hypothesis conjectural, but, to the contrary, say that there must be a reasonable probability of the

lands in question being combined. Our case is quite similar to **McCandless v. U. S.**, 298 U. S. 342, 345, where the offer of proof was almost identical to the offer of proof in this case, and this court held that "to exclude from the consideration of the jury evidence of this elementary character could not be otherwise than prejudicial."

The case most commonly cited on both sides of this question is **Olson v. United States**, 292 U. S. 246. In that case, the court declared at page 256:

> "The fact that the most profitable use of a parcel can be made only in combination with other lands does not necessarily exclude that use from consideration if the possibility of combination is reasonably sufficient to affect market value. . . . It is common knowledge that public service corporations and others having that power (eminent domain) frequently are actual or potential competitors, not only for tracts held in single ownership but also for rights of way, locations, sites and other areas requiring the union of numerous parcels held by different owners. And, to the extent that probable demand by prospective purchasers or condemnors affects market value, it is to be taken into account."

As to the admission of evidence on a net income theory where no other evidence is available, the Supreme Court in **Kimball Laundry Co. v. U. S.**, 338 U. S. 1, 5, said:

> "But where the property is of a kind seldom exchanged, it has no 'market price', and then recourse must be had to other means of ascertaining value."

A conflict in the state jurisdictions as to the law is of importance to this court in determining whether to exercise its discretion in allowing briefs to be filed. In **The**

United Fuel Gas Co. v. Allen case, 137 W. Va. 897 (1953), an important question was the market value of the Big Lime formation and the court admitted evidence as to the present market value of the lease saying, page 921:

> "Though the storage acreage upon which the witnesses computed the value is not in the vicinity of the Allen tract, the uniformity of underground formations suitable for gas storage purposes renders the testimony of these witnesses admissible."

The Illinois court excluded evidence of value of similar gas storage easement rights on the ground that this evidence was too speculative. The problem of valuation was also presented in **Milby v. Louisville Gas & Electric Co.**, 375 S. W. 2d 237 (Ky. 1964), and the court distinguished **Peoples Gas Light & Coke Co. v. Buckles**, 24 Ill. 2d 520 (1962), on the sole ground that the West Virginia court interpreted that case as holding that the only person who could use the underground gas storage space was the condemnor as no other gas supplier or pipeline company was competing. The court recognized the constitutional question when it stated at page 240:

> ". . . the mere fact that the particular condemnor has succeeded in obtaining control of most of a particular field and thus has created a situation in which no other public service corporation would have any use for the individual tract sought to be condemned, should not preclude the assignment of a market value to the lease rights in the tract sought to be condemned, in accordance with the rental prices paid for leases of other comparable rights. **Any other view would enable the condemnor to obtain parts of a storage field for nothing**, even though the field as a whole would have a substantial value on a competitive market." (Emphasis added.)

CONCLUSION.

Either the appeal should be allowed because of the unconstitutional interpretation of the Illinois Gas Storage Act by the Illinois court or certiorari should be granted because of the gross and obvious error of the lower court in excluding evidence of compensation.

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